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7, AND 8, AND URGENCY LEGISLATION THROUGH CH 713 OF THE 2010 REGULAR SESSION

EVIDENCE CODE
Division 10. Hearsay Evidence
Chapter 2. Exceptions to the Hearsay Rule
Article 3. Prior Statements of Witnesses

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Cal Evid Code § 1236 (2010)

§ 1236. Prior consistent statement

Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791.

HISTORY:

Enacted Stats 1965 ch 299 § 2, operative January 1, 1967.

NOTES:

Law Revision Commission Comments:

1965

Under existing law, a prior statement of a witness that is consistent with his testimony at the trial is admissible under certain conditions when the credibility of the witness has been attacked. The statement is admitted, however, only to rehabilitate the witness--to support his credibility--and not as evidence of the truth of the matter stated. *People v. Kynette*, 15 Cal.2d 731, 753-754, 104 P.2d 794, 805-806 (1940) (overruled on other grounds in *People v. Snyder*, 50 Cal.2d 190, 197, 324 P.2d 1, 6 (1958)).

Section 1236, however, permits a prior consistent statement of a witness to be used as substantive evidence if the statement is otherwise admissible under the rules relating to the rehabilitation of impeached witnesses. See *Evidence Code § 791*.

There is no reason to perpetuate the subtle distinction made in the cases. It is not realistic to expect a jury to understand that it cannot believe that a witness was telling the truth on a former occasion even though it believes that the same story given at the hearing is true.

Cross References:

"Evidence": *Ev C § 140.*

"Hearing": *Ev C § 145.*

"Statement": *Ev C § 225.*

Credibility of witnesses: *Ev C §§ 780 et seq.*

Admissibility of evidence of prior consistent statement: *Ev C § 791.*

Hearsay rule: *Ev C § 1200.*

Collateral References:

Matthew Bender (R) Practice Guide: Cal. Trial and Post Trial Civil Procedure §§ 11.101, 11.104[14]

Cal. Ins. Law & Practice (Matthew Bender(R)), ch 12, Claims Processing and Investigation § 12.10.

California Trial Guide, Unit 20, "Procedural Rules for Presentation of Evidence", § 20.30 (Matthew Bender).

California Trial Guide, Unit 40, "Hearsay", § 40.37 (Matthew Bender).

Cotchett, California Courtroom Evidence, § 21.25 (Matthew Bender).

1 Witkin Cal. Evidence (4th ed) Hearsay §§ 155, 161.

3 Witkin Cal. Evidence (4th ed) Presentation at Trial §§ 153, 160.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), *CALCRIM No. 318*, Prior Statements as Evidence.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), *CALCRIM No. 319*, Prior Statements of Unavailable Witness.

Jefferson's California Evidence Benchbook, 3rd Edition (CEB, 2003) §§ 10.16 et seq., 28.78 et seq.

Laying a Foundation To Introduce Evidence (Preparing and Using Evidence at Trial). CEB Action Guide, Summer 1991.

Law Review Articles:

A guide to the new Federal Rules of Evidence for the California lawyer; A practical comparison with the Evidence Code. 9 Bev Hills BJ No. 4, p. 10.

Video tape in civil cases; standards for admitting ex parte video tape material. *24 Hast LJ 30*.

Lie detector and rehabilitation of witnesses. *6 Stan LR 172*.

California Evidence Code - Federal Rules of Evidence V. Witnesses: Conforming the California Evidence Code to the Federal Rules of Evidence. *39 U.S.F.L. Rev. 455*.

Understanding and Applying Hearsay Rule. LA Law Vol. 14 No. 11 p 27.

Annotations:

Admissibility of impeached witness' prior consistent statement--modern state civil cases. *59 ALR4th 1000*.

Admissibility of impeached witness' prior consistent statement--modern state criminal cases. *58 A.L.R.4th 1014*.

Effect of *Rule 801(d)(1)(B) of the Federal Rules of Evidence* upon the admissibility of a witness' prior consistent statement. *47 A.L.R. Fed. 639*.

Hierarchy Notes:

Div. 10, Ch. 2, Art. 3 Note

NOTES OF DECISIONS 1. In General 2. Right of Confrontation 3. Admissible Evidence 4. Inadmissible Evidence

1. In General

Prior statements of a witness, consistent with his testimony, are, as an exception to the hearsay rule, admissible for the purpose of rehabilitation following an attempt to impeach the testimony of the witness. *People v. Gentry (1969, Cal App 3d Dist) 270 Cal App 2d 462, 76 Cal Rptr 336, 1969 Cal App LEXIS 1548*.

No oath to the answers to interrogatories is required for their admissibility as evidence of prior inconsistent or consistent statements under *Ev C §§ 1235, 1236*, though answers to interrogatories must be under oath to be admissible as such. *Le Grand v. Yellow Cab Co. (1970, Cal App 2d Dist) 8 Cal App 3d 125, 87 Cal Rptr 292, 1970 Cal App LEXIS 2027*.

Evidence sought to be admitted under *Ev C §§ 791 and 1236*, relating to prior consistent statements, may, under appropriate circumstances, be rejected on the ground of remoteness when offered in an attempt to rehabilitate a witness' testimony. *Morgan v. Stubblefield (1972) 6 Cal 3d 606, 100 Cal Rptr 1, 493 P2d 465, 1972 Cal LEXIS 153*.

The language of *Ev C § 1236* (prior consistent statement), is virtually identical to *Ev C § 1235* (prior inconsistent statement). In fact, the provisions were enacted as part of the same legislative bill in 1965, and both became effective on Jan. 1, 1967. Thus, under ordinary rules of statutory construction, *Ev C § 1236*, should be interpreted consistently with *Ev C § 1235*. *People v. Hitchings (1997, Cal App 1st Dist) 59 Cal App 4th 915, 69 Cal Rptr 2d 484, 1997 Cal App LEXIS 991, rehearing denied (1997, Cal App 1st Dist) 60 Cal App 4th 792, 1997 Cal App LEXIS 1107, review denied (1998, Cal) 1998 Cal LEXIS 1702*.

2. Right of Confrontation

In a prosecution of life prisoners for assault on a fellow prisoner, defendants' Sixth Amendment right of confrontation was not violated by the receipt, in evidence, of the witnesses' prior consistent statements, where the witnesses were subject to full and effective cross-examination. *People v. Cannady* (1972) 8 Cal 3d 379, 105 Cal Rptr 129, 503 P2d 585, 1972 Cal LEXIS 260.

A defendant was not denied his rights to confront witnesses when the trial court allowed the adult prosecuting witness, who suffered from established physical and mental disabilities, to testify at trial by means of a prior videotape recording. The recording was admissible as a prior consistent statement and not unduly prejudicial. *People v. Williams* (2002, Cal App 2d Dist) 102 Cal App 4th 995, 125 Cal Rptr 2d 884, 2002 Cal App LEXIS 4781, rehearing denied (2002, Cal App 2d Dist) 2002 Cal App LEXIS 4916, review denied (2003, Cal) 2003 Cal LEXIS 274.

3. Admissible Evidence

Under the rule permitting evidence of prior consistent statements for the purpose of rehabilitation, in a robbery case, the prosecution was entitled to show that two accomplices had implicated defendant before an alleged motive to fabricate arose, where the idea that they were implicating defendant in their testimony at trial because of deal made with the district attorney's office was firmly implanted in the minds of the jury by defense cross-examination; and the presence of another questionable motive to fabricate did not deprive the prosecution of its right to show that a motive, clearly established by the evidence, did not affect the witness' stories. *People v. Duvall* (1968, Cal App 2d Dist) 262 Cal App 2d 417, 68 Cal Rptr 708, 1968 Cal App LEXIS 2327, cert den (1969) 393 US 1070, 89 S Ct 729, 21 L Ed 2d 714, 1969 US LEXIS 2765.

In a criminal prosecution, evidence concerning consistent statements made by a prosecuting witness at a time well prior to the testimony given by him at the trial, for the purpose of rehabilitation of the witness by showing that he was not testifying at the trial from improper motives of interest or improper influences by the state was properly received where the prior consistent statements were made before the existence of any possible motive to falsify. *People v. Hernandez* (1968, Cal App 5th Dist) 263 Cal App 2d 242, 69 Cal Rptr 448, 1968 Cal App LEXIS 2202.

In a prosecution for inflicting cruel or inhuman corporal punishment upon a child, evidence of a prosecution witness' prior statements consistent with his testimony on direct examination was properly admitted to rehabilitate him, where after defense counsel asked questions on cross-examination designed to show that the witness' testimony implicating defendant in the crime was fabrication, the witness on redirect examination gave a satisfactory explanation of the incidents brought out on cross-examination, and where the prior statements were made before any improper motive was alleged to have arisen. *People v. Gentry* (1969, Cal App 3d Dist) 270 Cal App 2d 462, 76 Cal Rptr 336, 1969 Cal App LEXIS 1548.

In a robbery prosecution, the trial court properly admitted into evidence a police officer's testimony that the victim had stated that he had difficulty in making a positive identification of defendant at a lineup because defendant had changed his hairstyle. The victim had been subjected to an implied charge that his positive identification of defendant at trial was recently fabricated. Accordingly, the prosecution was entitled to elicit the victim's prior consistent statement to dispel that implied charge (*Ev C* §§ 791, 1236). *People v. Randle* (1992, Cal App 2d Dist) 8 Cal App 4th 1023, 10 Cal Rptr 2d 804, 1992 Cal App LEXIS 995, review denied (1992, Cal) 1992 Cal LEXIS 6013.

In a capital homicide prosecution, the trial court properly admitted testimony from a friend of a witness that the witness told her that defendant had shot three men, and described the shootings. The testimony was a prior consistent statement necessary to rehabilitate the witness's testimony following cross-examination (*Ev C* §§ 791, 1236). On cross-examination of the witness, defense counsel elicited testimony he had given his account of events implicating defendant in the killings only after he himself had been charged with two counts of murder and after he had spoken with his attorney. He was then released from custody and the charges were dropped. Impliedly, the defense was attempting to undermine the witness's credibility by suggesting his attorney had encouraged him to fabricate the accusations against defendant. Since the statements to the witness's friend were made before that motive arose, they were properly admitted

under *Ev C* § 1236. *People v. Bolin* (1998) 18 Cal 4th 297, 75 Cal Rptr 2d 412, 956 P2d 374, 1998 Cal LEXIS 3645, rehearing denied (1998, Cal) 1998 Cal LEXIS 5197, cert den *Bolin v. California* (1999) 526 US 1006, 119 S Ct 1146, 143 L Ed 2d 213, 1999 US LEXIS 1765.

During the penalty phase of a criminal prosecution for one count of murder and several counts of rape, the court properly excluded evidence of tape-recorded conversations defendant had with his wife showing remorse for his crimes. Defendant failed to show a basis for admitting the conversations under *Ev C* §§ 791, 1236, because the prosecutor never argued that the recorded statements were inconsistent statements defendant made in jail. *People v. Smith* (2003) 30 Cal 4th 581, 134 Cal Rptr 2d 1, 68 P3d 302, 2003 Cal LEXIS 2988, cert den *Smith v. California* (2004) 540 US 1163, 124 S Ct 1169, 157 L Ed 2d 1208, 2004 US LEXIS 870.

In defendant's capital murder case, a court did not err by admitting a witness's statement regarding the purchase of a car from defendant because it preceded the police inquiries and investigation, and therefore, the testimony was admissible as a prior consistent statement. *People v. Crew* (2003) 31 Cal 4th 822, 3 Cal Rptr 3d 733, 74 P3d 820, 2003 Cal LEXIS 6293, rehearing denied (2003) 2003 Cal. LEXIS 8298, 2003 D.A.R. 11886, cert den *Crew v. California* (2004) 541 U.S. 991, 124 S. Ct. 2018, 158 L. Ed. 2d 497, 2004 U.S. LEXIS 2810, 72 U.S.L.W. 3656.

Witness's prior consistent statements were admissible under *Ev C* §§ 791 and 1236 to rehabilitate her and to support her credibility after defendant suggested on cross-examination that her testimony implicating defendant was biased or fabricated because of threats of prosecution made by the police and the district attorney. *People v. Kennedy* (2005) 36 Cal 4th 595, 31 Cal Rptr 3d 160, 115 P3d 472, 2005 Cal LEXIS 8149, rehearing denied *People v. Kennedy (Jerry N.)* (2005) 2005 Cal. LEXIS 11322, 2005 D.A.R. 12273, cert den *Kennedy v. California* (2006) 126 S. Ct. 1781, 164 L. Ed. 2d 527, 2006 U.S. LEXIS 3200, 74 U.S.L.W. 3585.

Testimony was admissible as a prior consistent statement under *Ev C* §§ 791 and 1236; the defense in its examination of the witness asserted bias and a motive for fabrication by the witness when it suggested that his testimony was influenced by promises from surrounding counties that they would not prosecute the witness. The witness's statement to a detective was consistent with his testimony at trial and was made before any promises not to prosecute him. *People v. Kennedy* (2005) 36 Cal 4th 595, 31 Cal Rptr 3d 160, 115 P3d 472, 2005 Cal LEXIS 8149, rehearing denied *People v. Kennedy (Jerry N.)* (2005) 2005 Cal. LEXIS 11322, 2005 D.A.R. 12273, cert den *Kennedy v. California* (2006) 126 S. Ct. 1781, 164 L. Ed. 2d 527, 2006 U.S. LEXIS 3200, 74 U.S.L.W. 3585.

There was an adequate foundation for the admission of a witness's prior inconsistent statement that defendant, under a different name, confessed to a murder. Although the relevance of the statements depended upon the preliminary fact that defendant was the person who made the confession, which the witness denied at trial, the record supported a finding that the witness's in-court testimony was unreliable and that her prior inconsistent statements were more accurate. *People v. Hinton* (2006) 37 Cal 4th 839, 38 Cal Rptr 3d 149, 126 P3d 981, 2006 Cal LEXIS 336, modified, rehearing denied *People v. Hinton (Eric L.)* (2006) 2006 Cal. LEXIS 4634, 2006 D.A.R. 4365, cert den *Hinton v. California* (2006) 127 S. Ct. 581, 166 L. Ed. 2d 434, 2006 U.S. LEXIS 8662, 75 U.S.L.W. 3263.

In a capital murder trial, a detective was properly allowed to testify that a witness had told him that defendant had displayed a shotgun because the defense challenged the witness on the consistency of her prior statements about the kind of gun displayed. The statement to the detective was a prior consistent statement under *Ev C* §§ 791, 1236. *People v. Lewis and Oliver* (2006) 39 Cal 4th 970, 47 Cal Rptr 3d 467, 140 P3d 775, 2006 Cal LEXIS 9974, cert den *Oliver v. California*, (2007, US) 127 S Ct 2130, 167 L Ed 2d 867, 2007 US LEXIS 4584, cert den *Lewis v. California*, (2007, US) 127 S Ct 2130, 167 L Ed 2d 867, 2007 US LEXIS 4585.

Trial court did violate defendant's rights to a fair jury trial and to due process by giving two instructions on witness credibility because, as to *CALJIC* No. 2.13, the instruction in no way directed the jury to accept prior statements as the truth, but merely covered the hearsay exceptions provided in *Ev C* § 1235 and *Ev C* § 1236 in a neutral fashion; as to *CALJIC* No. 2.24, defense counsel had specifically requested the instruction, and in any event defendant underestimated

the common sense of jurors by faulting the instruction for not referring to a witness's character for dishonesty or untruthfulness. *People v. Harris* (2008, Cal) 43 Cal 4th 1269, 78 Cal Rptr 3d 295, 185 P 3d 727, 2008 Cal LEXIS 7331, rehearing denied *People v. Harris Lanell (Craig)* (2008, Cal.) 2008 Cal. LEXIS 9411, cert den *Harris v. California* (2009, U.S.) 129 S. Ct. 922, 173 L. Ed. 2d 130, 2009 U.S. LEXIS 1.

In a case where a jury found defendant not guilty of first-degree murder and guilty of second-degree murder, trial court did not err in admitting hearsay testimony regarding inculpatory statements that defendant made shortly after the killing pursuant to the prior consistent statement exception to the hearsay rule, and where defense counsel had plainly suggested that the witness at issue had fabricated his testimony, or that his testimony had been influenced by an improper motive. *People v. Turk* (2008, 4th Dist) 164 Cal App 4th 1361, 80 Cal Rptr 3d 473, 2008 Cal App LEXIS 1106, review denied *People v. Turk (Shaun Thomas)* (2008, Cal.) 2008 Cal. LEXIS 12986.

Leading questions asked by the prosecutor in a death penalty case were permissible under *Ev C* §§ 764, 767, subd. (a)(1), as to prior statements and inconsistencies. Some statements referenced by the prosecutor qualified as prior inconsistent statements under *Ev C* §§ 770, 1235. Others were admissible as prior consistent statements under *Ev C* §§ 791, 1236. *People v. Collins* (2010, Cal) 2010 Cal LEXIS 5032.

Undisclosed criminal history of a prosecution witness would not have damaged the witness's credibility to any significant degree because her preliminary hearing testimony, given several months before the charges at issue, was consistent with her trial testimony, and could have been presented as a prior consistent statement under *Ev C* §§ 1236, 791, subd. (b). Thus, the undisclosed material was not material and there was no Brady violation. *People v. Letner & Tobin* (2010, Cal) 2010 Cal LEXIS 7290.

4. Inadmissible Evidence

In an action for injuries incurred in a traffic accident, the testimony of a witness relating what the defendant driver had said immediately after the accident to another witness who, in turn, shortly thereafter related the conversation to the testifying witness, was not admissible as a prior consistent statement under *Ev C* §§ 1236, 791, providing that evidence or a prior consistent statement is inadmissible unless it is offered after an express or implied charge has been made that the testimony is recently fabricated or is influenced by bias, where defendants asked the witness, to whom the driver had spoken, on cross-examination whether he had read his deposition prior to testifying and also questioned whether he could actually comprehend the driver's inquiries, inasmuch as they were standing 300-400 feet apart when made. While it is clear that "impeachment" will be treated as a charge of "recent fabrication" for purposes of coming within the hearsay exception, the impeachment must create an inference of such fabrication, and defendant's cross-examination did not give rise to such an inference. *Box v. California Date Growers Assn.* (1976, Cal App 4th Dist) 57 Cal App 3d 266, 129 Cal Rptr 146, 1976 Cal App LEXIS 1451.

In a medical malpractice action arising out of defendant physicians' alleged failure to timely diagnose spinal meningitis in an eight-week old infant, in which a key issue was what the mother reported as the child's temperature over the weekend before the child was hospitalized, proffered testimony by a babysitter as to statements made by the mother about a weekend conversation she had with one of defendants about the child's condition, in order to show prior consistent statements by the mother (*Ev C* §§ 791, 1236), was properly excluded, where there was no showing of any prior inconsistent statement by the mother. In addition, had the babysitter been allowed to testify in accordance with the offer of proof to the effect that defendant stated he did not think the child was sick enough to be seen by him, with no mention of a specific temperature, such testimony would have been consistent with defendants' evidence of habit and custom and their theory of non-negligence. Thus, any assumed error in refusing the admission of the hearsay conversation was not prejudicial to plaintiffs. *Dincau v. Tamayose* (1982, Cal App 2d Dist) 131 Cal App 3d 780, 182 Cal Rptr 855, 1982 Cal App LEXIS 1459.

On retrial in a murder prosecution, the trial court did not err by denying defendant's request to play the entire audiotape of defendant's conversation with his girlfriend for the jury to demonstrate that he had professed a lack of

memory prior to being charged, since the tape was not admissible as a prior consistent statement under *Ev C §§ 791 and 1236*. First, neither of the conditions set forth in the plain language of *Ev C § 791*, was met. Although the district attorney argued to the jury that defendant could have been lying about his lack of memory, nothing in the record showed the district attorney attacked defendant's credibility through evidence of an inconsistent statement made by defendant after his conversation with his girlfriend (*Ev C § 791(a)*). Also, defendant's conversation with his girlfriend took place after his arrest for the murders, and the arrest provided a motive for bias or fabrication. Thus, *Ev C § 791(b)*, was also inapplicable. Second, the tape was not admissible as a prior consistent statement under *Ev C §§ 791 and 1236*, because defendant never testified at the second trial. Thus, he did not testify at "the hearing" at which the question of whether his prior consistent statements were admissible arose. Accordingly, the statements to his girlfriend could not be consistent with his testimony at "the hearing," as required under the two statutes. *People v. Hitchings* (1997, Cal App 1st Dist) 59 Cal App 4th 915, 69 Cal Rptr 2d 484, 1997 Cal App LEXIS 991, rehearing denied (1997, Cal App 1st Dist) 60 Cal App 4th 792, 1997 Cal App LEXIS 1107, review denied (1998, Cal) 1998 Cal LEXIS 1702.

Trial court's exclusion of defendant's post-offense handwritten statements--a handwritten will and five pages of notes he prepared in the hours after his shooting of peace officers--as hearsay during the guilt phase of defendant's capital murder trial was not error where there was ample ground to suspect defendant's motives and sincerity when he wrote the self-serving documents. The documents were not admissible as prior consistent statements because defendant failed to explain how particular oral statements were inconsistent with his earlier written statements, and any prior written statements did not automatically become admissible merely because defendant's credibility in general was attacked during cross-examination. *People v. Ervine* (2009, Cal) 2009 Cal LEXIS 12406.